

E-Filed 9/23/15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LEON LEE MEYERS,

No. C 14-3123 RS (PR)

Plaintiff,

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

v.

DEPARTMENT OF CORRECTIONS
AND REHABILITATION, et al.,

Defendants.

INTRODUCTION

Plaintiff, a state prisoner proceeding pro se, filed this federal civil rights action under 42 U.S.C. § 1983 in which he raises Eighth Amendment medical treatment claims against his medical staff at Salinas Valley State Prison. The first amended complaint is now before the Court for review pursuant to 28 U.S.C. § 1915A(a).

The first amended complaint is DISMISSED with leave to amend. Plaintiff shall file a second amended complaint on or before November 2, 2015.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

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1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
 2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
 3 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
 4 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
 5 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

6 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
 7 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
 8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
 9 plausibility when the plaintiff pleads factual content that allows the court to draw the
 10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
 11 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
 12 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
 13 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
 14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
 15 that a right secured by the Constitution or laws of the United States was violated, and (2)
 16 that the alleged violation was committed by a person acting under the color of state law. *See*
 17 *West v. Atkins*, 487 U.S. 42, 48 (1988).

18 **B. Legal Claims**

19 Plaintiff alleges that (1) in 2011, Lahey, a nurse at Salinas Valley, was deliberately
 20 indifferent to his case of the shingles, which he contracted from his cellmate; (2) Drs. Mack,
 21 Birdsong, and Kumar, physicians at the prison, were deliberately indifferent to his case of the
 22 shingles at various unspecific times; (3) Drs. Posson, J. Dunlop, and Fernando Tuvera, who
 23 reviewed his medical grievances, failed to approve his transfer to another institution;
 24 (4) unspecified persons are liable for his contracting various diseases (shingles, Hepatitis B,
 25 and a staph infection) while he had to care for his cellmate; and (5) K. Moore, a Salinas
 26 Valley grievance counselor, cancelled his transfer to another institution. Liberally construed,
 27 Claims 1, 3, and 5 are cognizable under section 1983.
 28

1 Claims 2 and 4 are DISMISSED with leave to amend. It is not sufficient to state
2 merely that Mack, Birdsong, and Kumar were deliberately indifferent at various unspecified
3 times. Plaintiff must provide specific details, such as the dates (or approximate dates) on
4 which he saw these doctors, what symptoms he displayed, what treatment was (or should
5 have been) administered, a summary of the discussions he had with these doctors, and what
6 facts show that they were deliberately indifferent. Plaintiff is reminded that these facts are
7 crucial not only to the survival of his claims against Mack, Birdsong, and Kumar, but also to
8 the survival of his claims against Posson, J. Dunlop, Fernando Tavera, and Moore, which are
9 based in large part on his allegations against his doctors.

10 It is also insufficient to assert that the staff at the prison are responsible for the injuries
11 he suffered while being housed with an infectious cellmate. Plaintiff must provide names of
12 the persons directly responsible, and how they should have known about the conditions he
13 faced.

14 The following persons and institutions are TERMINATED as defendants in this action
15 because plaintiff has failed to state specific claims against them: Randy Grounds, Warden of
16 Salinas Valley, J. Lewis, Deputy Director, S. Njeser, Health Care Services, Dr. Stainer, and
17 Jeffrey Beard. The Court assumes that he named these persons and institutions in the belief
18 that they are liable as supervisors. This is not sufficient to state claims against them. There
19 is no respondeat superior liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
20 1989). It is not enough that the supervisor merely has a supervisory relationship over the
21 defendants; the plaintiff must show that the supervisor “participated in or directed the
22 violations, or knew of the violations and failed to act to prevent them.” *Id.* Furthermore,
23 supervisor defendants are entitled to qualified immunity where the allegations against them
24 are simply “bald” or “conclusory” because such allegations do not “plausibly” establish the
25 supervisors’ personal involvement in their subordinates’ constitutional wrong. *Ashcroft v.*
26 *Iqbal*, 129 S. Ct. 1937, 1948–52 (2009). If plaintiff wishes to allege liability against the
27 now-dismissed defendants based on supervisory liability, he must allege specific facts
28

1 sufficient to meet these stringent standards.

2 Accordingly, the complaint is DISMISSED with leave to file an amended complaint
3 on or before November 2, 2015. The amended complaint must include the caption and civil
4 case number used in this order (14-3123 RS (PR)) and the words SECOND AMENDED
5 COMPLAINT on the first page. Because an amended complaint completely replaces the
6 previous complaints, plaintiff must include in his amended complaint all the claims he wishes
7 to present and all of the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963 F.2d 1258,
8 1262 (9th Cir. 1992). Any claims not raised in the amended complaint will be deemed
9 waived. Plaintiff may not incorporate material from the prior complaint by reference.
10 Failure to file an amended complaint in accordance with this order will result in dismissal of
11 this action without further notice to plaintiff.

12 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
13 informed of any change of address by filing a separate paper with the clerk headed "Notice of
14 Change of Address." He must comply with the Court's orders in a timely fashion or ask for
15 an extension of time to do so. Failure to comply may result in the dismissal of this
16 action pursuant to Federal Rule of Civil Procedure 41(b).


17 MOTION TO APPOINT COUNSEL

18 Plaintiff's motion for the appointment of counsel (Docket No. 31) is DENIED without
19 prejudice. The decision to request counsel to represent an indigent litigant under 28 U.S.C.
20 § 1915 is within "the sound discretion of the trial court and is granted only in exceptional
21 circumstances." *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
22 "exceptional circumstances" requires an evaluation of the likelihood of the plaintiff's success
23 on the merits and an evaluation of the plaintiff's ability to articulate his claims pro se in light
24 of the complexity of the legal issues involved. *See Agyeman v. Corrections Corp. of*
25 *America*, 390 F.3d 1101, 1103 (9th Cir. 2004). Neither the need for discovery, nor the fact
26 that the pro se litigant would be better served with the assistance of counsel, necessarily
27 qualify the issues involved as complex. *See Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir.

1 1997). Plaintiff has not shown that exceptional circumstances exist. The Clerk shall
2 terminate Docket No. 31.

3 **IT IS SO ORDERED.**

4 DATED: September 23, 2015


RICHARD SEEBORG
United States District Judge

United States District Court
For the Northern District of California